

and other evidence in support of a narrative statement.

(4) The filing of any motions by any party, including motions for the production of documentation, data, or other information material to the disputed facts to be addressed at the hearing.

(b) The Presiding Officer may also, on motion or *sua sponte*, schedule one or more pre-hearing conferences on the record to address any of the following:

(1) Simplification, clarification, amplification, or limitation of the issues.

(2) Admissions and stipulations of facts and determinations of the genuineness of documents.

(3) Objections to the introduction into evidence at the hearing of any written testimony or other submissions proposed by a party; *provided* that at any time before the end of the hearing, any party may make, and the Presiding Officer may consider and rule upon, a motion to strike testimony or other evidence (other than evidence included in the administrative record (if any) under § 72.63 of this chapter) on the grounds of relevance, competency, or materiality.

(4) Taking official notice of any matters.

(5) Grouping of parties with substantially similar interests to eliminate redundant evidence, motions, objections, and briefs.

(6) Such other matters that may expedite the hearing or aid in the disposition of matters in dispute.

(c) The Presiding Officer will issue an order (which may be in the form of a transcript) reciting the actions taken at any pre-hearing conferences, setting the schedule for any hearing, and stating any areas of factual and legal agreement and disagreement and the methods and procedures to be used in developing any evidence.

§ 78.14 Evidentiary hearing procedure.

(a) If a request for an evidentiary hearing is granted, the Presiding Officer will conduct a fair and impartial hearing on the record, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. For these purposes, the Presiding Officer may:

(1) Administer oaths and affirmations.

(2) Regulate the course of the hearings and prehearing conferences and govern the conduct of participants.

(3) Examine witnesses.

(4) Identify and refer issues for interlocutory decision under § 78.19 of this part.

(5) Rule on, admit, exclude, or limit evidence.

(6) Establish the time for filing motions, testimony and other written evidence, and briefs and making other filings.

(7) Rule on motions and other pending procedural matters, including but not limited to motions for summary disposition in accordance with § 78.15 of this part.

(8) Order that the hearing be conducted in stages whenever the number of parties is large or the issues are numerous and complex.

(9) Allow direct and cross-examination of witnesses only to the extent the Presiding Officer determines that such direct and cross-examination may be necessary to resolve disputed issues of material fact; *provided* that no direct or cross-examination shall be allowed on questions of law or policy or regarding matters that are not subject to challenge in the evidentiary hearing.

(10) Limit public access to the hearing where necessary to protect confidential business information. The Presiding Officer will provide written notice of the hearing to the parties, and where the hearing will be open to the public, notice in the FEDERAL REGISTER no later than 15 days (or other shorter, reasonable period established by the Presiding Officer) prior to commencement of the hearings.

(11) Take any other action not inconsistent with the provisions of this part for the maintenance of order at the hearing and for the expeditious, fair and impartial conduct of the proceeding.

(b) All direct and rebuttal testimony at an evidentiary hearing shall be filed in written form, unless, upon motion and good cause shown, the Presiding Officer, in his or her discretion, determines that oral presentation of such evidence on any particular factual

issue will materially assist in the efficient resolution of the issue.

(c)(1) The Presiding Officer will admit all evidence that is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded in the Federal courts under the Federal Rules of Evidence shall not be admissible.

(2) Whenever any evidence or testimony is excluded by the Presiding Officer as inadmissible, all such evidence will remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof by means of a brief statement on the record describing the testimony excluded.

(3) When two or more parties have substantially similar interests and positions, the Presiding Officer may limit the number of attorneys or authorized representatives who will be permitted to examine witnesses and to make and argue motions and objections on behalf of those parties.

(4) Rulings of the Presiding Officer on the admissibility of evidence or testimony, the propriety of direct and cross-examination, and other procedural matters will appear in the record of the hearing and control further proceedings unless reversed by the Presiding Officer or as a result of an interlocutory appeal taken under § 78.19 of this part.

(5) All objections shall be made promptly or be deemed waived; *provided* that parties shall be presumed to have taken exception to an adverse ruling. No objection shall be deemed waived by further participation in the hearing.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

§ 78.15 Motions in evidentiary hearings.

(a) Any party may make a motion to the Presiding Officer on any matter relating to the evidentiary hearing in accordance with the scheduling orders issued under § 78.13 of this part. All motions shall be in writing and served as provided in § 78.4 of this part, except those made on the record during an oral hearing before the Presiding Officer.

(b) Any party may make a motion for a summary disposition in its favor on any factual issue on the basis that there is no genuine issue of material fact. When a motion for summary disposition is made and supported, any party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or by other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact.

(c) Within 10 days (or other shorter, reasonable period established by the Presiding Officer) after a motion made on the record or service of any written motion, any party may file a response to the motion.

(d) The Presiding Officer may schedule an oral argument and call for the filing of briefs on any motion. The Presiding Officer will rule on the motion within a reasonable time after the date that responses to the motion may be filed under paragraph (c) of this section and that any oral argument or filing of briefs is completed.

(e) If all factual issues are decided by summary disposition prior to the hearing, no hearing will be held and the Presiding Officer will issue a proposed decision under § 78.18 of this part. If a summary disposition is denied or if partial summary disposition is granted, the hearing shall proceed on the remaining issues.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

§ 78.16 Record of appeal proceeding.

(a) The proposed decision issued by the Presiding Officer, transcripts of oral hearings or oral arguments, written direct and rebuttal testimony, and any other written materials of any kind filed in the proceeding will be part of the record and will be available to the public in the office of the Hearing Clerk, subject to the requirements of part 2 of this chapter.

(b) Hearings and oral arguments shall be recorded as specified by the Presiding Officer, and thereupon transcribed. After the hearing or oral argument, the reporter will certify and file with the Hearing Clerk.

(1) The original transcript; and

(2) Any exhibits received or offered into evidence at the hearing.